Supreme Court, U.S.
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No. 07-82

In The

Supreme Court of the United States

ROMANO CAMPOLI,

Petitioner,

versus

HEALTHEXTRAS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Federal Rules of Civil Procedure require a complaint to state expressly and with specificity the "legal theory" upon which the claim is based.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Romano Campoli, Petitioner;
2. Jim Waide, Counsel for Petitioner;
3. HealthExtras, Inc., Respondent;
4. Mary Gambardella, Counsel for Respondent; and
5. Dean R. Singewald, II, Counsel for Respondent.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	1
STATEMENT OF THE CASE	2
FACTS	2
REASON FOR GRANTING WRIT	8
I. The district court's and court of appeals' requirement that "legal theory" be pled expressly is inconsistent with Federal Rule of Civil Procedure 8(a), controlling decisions of this Court, and the decisions of other circuits	8
CONCLUSION	13
APPENDIX A, United States Court of Appeals for the Second Circuit, Summary Order, filed Apr. 6, 2007	App. 1
APPENDIX B, United States District Court, District of Connecticut, Memorandum of Decision, filed Jan. 9, 2006	App. 5
APPENDIX C, United States Court of Appeals for the Second Circuit, Denial of Petition for Rehearing, filed Apr. 25, 2006)	App. 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bell v. Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955 (2007) 8, 10, 11

Conley v. Gibson, 355 U.S 41 (1957) 9, 11

Erickson v. Pardus, ___ U.S. ___, 127 S.Ct. 2197 (2007) 8, 9

First Investors Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162 (2nd Cir. 1998) 12

Flickinger v. Harold C. Brown & Co., Inc., 947 F.2d 595 (2nd Cir. 1991) 7, 9

Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, Charlotte Branch, 80 F.3d 895 (4th Cir. 1996) 9

Gins v. Mauser Plumbing Supply Co., 148 F.2d 974 (2nd Cir. 1945) 9

Hanna v. Plumer, 380 U.S. 460 (1965) 12

Hefferman v. Bass, 467 F.3d 596 (7th Cir. 2006) 9

Hickman v. Taylor, 329 U.S. 495 (1947) 10

Leatherman v. Tarrant County, 507 U.S. 163 (1993) 11

Ledain v. Town of Ontario, 746 N.Y.S.2d 760 (N.Y. Sup. 2002) 12

Newman v. Silver, 713 F.2d 14 (2nd Cir. 1983) 9

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 10, 11

FEDERAL STATUTES

28 U.S.C. § 1254 (2006) 1

TABLE OF AUTHORITIES – Continued

Page

FEDERAL RULES

Fed. R. Civ. P. 8 .....1, 2, 9, 10
Fed. R. Civ. P. 9 11
Fed. R. Civ. P. 12 8
Fed. R. Civ. P. 26 10
Fed. R. Civ. P. 54 11

OPINIONS BELOW

The unreported decision of the United States District Court for the District of Connecticut, granting summary judgment in favor of HealthExtras, Inc. is attached as Appendix B. The unreported decision of the United States Court of Appeals for the Second Circuit affirming the district court's decision in favor of the Respondent is attached as Appendix A. The order denying Petitioner's petition for rehearing is attached as Appendix C.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit decided on April 6, 2007, and petition for rehearing denied on April 25, 2007, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The Rule of Civil Procedure involved is Fed. R. Civ. P. 8(a), which states:

> **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled

> to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

STATEMENT OF THE CASE

The United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit have determined, without citing any legal authority that the Federal Rules of Civil Procedure require that the complaint expressly state the "legal theory" upon which the claim is based and subsequently, determined summary judgment was proper for failure to do so. Believing that this holding conflicts both with the plain language of Fed. R. Civ. P. 8(a), and with the precedent of this Court, Petitioner Romano Campoli (hereinafter "Campoli") requests this Court grant the Writ and reverse the judgment.

FACTS

On June 30, 2003, Campoli filed suit against, *inter alia*, Federal Insurance Company (hereinafter "Federal") and the Respondent HealthExtras, Inc. (hereinafter "HealthExtras"). The lead paragraph of the complaint reads:

> This is an action to recover actual and punitive damages for breach of an insurance contract and for intentional and negligent misrepresentations

concerning coverage to be provided under an insurance contract.

A1.[1]

The specific legal theory underlying the complaint was that Federal is liable for breach of contract and HealthExtras is liable for misrepresenting the contents of the insurance contract. A5. The complaint attached several advertising materials issued by HealthExtras, indicating that HealthExtras was agreeing to provide Campoli a $1,000,000.00 disability benefit upon Campoli's becoming disabled. A8-29. The complaint alleges that on November 8, 2001, while Campoli was temporarily working in Mississippi to begin an ice cream manufacturing business, he tripped over a step which precipitated an intracerebral hemorrhage, leaving him totally disabled. A5. Campoli's claim for the disability benefit was denied on the grounds that his disability was not caused by an "accident" within the terms of the insurance policy which had been "underwritten" by Federal. A36-39.

On December 19, 2003, HealthExtras answered. A42-48. Although the complaint had not pled expressly that HealthExtras is liable under a breach of contract theory, HealthExtras clearly understood such a claim was raised since it expressly denied liability under such a theory, stating that: "THIRD DEFENSE: Plaintiff's claim for breach of contract fails for failure of consideration." A46.

After the United States District Court for the Northern District of Mississippi transferred the case to the

[1] The abbreviation "A" refers to the Appendix that was filed in the United States Court of Appeals for the Second Circuit.

United States District Court for the Eastern District of Connecticut, A49-53, Federal moved to refer the case to arbitration. A61-62. The court sent the case to arbitration as to Federal only. A76-77. The case proceeded in the district court as to HealthExtras only.

On January 5, 2005, Campoli moved to amend the complaint so as to make HealthExtras liable for any breach of contract committed by Federal based on the legal theory that the defendants were "joint venturers." A100-01. The court permitted the filing of this amended complaint. A155. The first amended complaint, like the original complaint, does not expressly plead breach of contract as to HealthExtras. The only legal theories expressly mentioned in the first amended complaint are "misrepresentation" and "joint venturer." A156-61.

Like the original complaint, the first amended complaint incorporates advertising materials indicating that HealthExtras promised to pay the $1,000,000.00 disability benefit or to assure that it was paid. A8-29.

On August 25, 2005, HealthExtras moved for summary judgment, arguing that Campoli has insufficient facts to support either his claim of liability based on the theory of "joint venturer" or his claim of "misrepresentation." A216, 218, 222.

On September 14, 2005, Campoli filed his opposition to the motion for summary judgment. A436-35. The response conceded summary judgment is appropriate on the misrepresentation claim but argued that "there are genuine issues of material fact as to HealthExtras' liability for breach of contract." A436. Campoli's response also argued that the failure to plead the claim in the first amended complaint does not bar its consideration since

there is no requirement that legal theories be pled. A561-63. Campoli argued that the evidentiary materials furnished by HealthExtras and attached to the complaint and first amended complaint are sufficient to demonstrate a claim of breach of contract by failing either to pay Campoli's claim or assure that it was paid. A556-61. HealthExtras' reply brief, filed October 4, 2005, does not address Campoli's claim that a breach of contract argument could be considered. HealthExtras' reply brief never argues that a breach of contract claim was not pled. A570-79. Rather, the reply brief was devoted almost entirely to arguing that the facts are not sufficient to support liability on a joint venturer theory. *See* A570-79.

On December 13, 2005, HealthExtras filed a "supplemental reply to Plaintiff's opposition to motion for summary judgment." A664-70. This supplemental reply alleges that Campoli had agreed to settle his claim with Federal, and that the settlement with Federal mandated dismissal of the claim against HealthExtras because release of the principal (Federal) also releases the surety (HealthExtras). A668. Once again, in its supplemental reply to Campoli's opposition to motion for summary judgment, HealthExtras still did not argue that the breach of contract claim could not be considered because it was not pled.

On December 19, 2005, Campoli responded to HealthExtras' supplemental reply, and stated that the settlement agreement with Federal would contain a reservation of rights which would state:

> Nothing in this Agreement shall release Campoli's claims or potential claims arising out of or connected in any way with the allegations or

> claims set forth in the Action against Defendant HealthExtras, Inc., or in any way restrict Campoli's ability to pursue his allegations or claims against HealthExtras in the Action.

A677.

On December 20, 2005, the district court conducted an evidentiary hearing on the motion for summary judgment. A706-07. While HealthExtras had never argued that the breach of contract claim could not be considered because it was not pled, the district court raised the point sua sponte that it would not consider the breach of contract claim since it was not expressly pled. The majority of the hearing addressed this point. The court stated:

> THE COURT: You have a misrepresentation claim in your complaint. I understand that you have a claim in your complaint that representations were made by Health Extras to the Campolis or Mr. and Mrs. Campoli and those representations were not true, et cetera, you have that complaint.
>
> What you don't have in this complaint, honestly, to be fair, is a claim that somebody – I want you in a second to tell me who – entered into a contract with Health Extras, the terms of which were as follows, and that Health Extras breached those terms in one or more of the following respects and therefore they're liable for breach of

> contract. To be fair, that's not in the complaint.

A733.

On January 9, 2006, the district court issued a memorandum decision in which, consistent with the above comment, it ruled that the breach of contrac claim could not be considered because it was not pled. A693-97. Accordingly, the court sustained HealthExtras' Motion for Summary Judgment. *Id.*; A701.

Campoli then timely filed his Notice of Appeal to the United States Court of Appeals for the Second Circuit. A703. In that appeal, Campoli raised only the issue of whether the district court was correct in dismissing the breach of contract claim for failure to plead it expressly and with specificity.

On appeal, the Second Circuit entered an order affirming the judgment, finding that "the First Amended Complaint did not confer 'fair notice' to the defendant of a punitive breach of contract claim. No such claim was *expressly* included in the complaint, and . . . the elements of such of a claim were not implied . . . " Summary Order, p. 3, App. A (emphasis added).

Campoli filed a petition for rehearing, pointing out that the Second Circuit's decision is inconsistent with various decisions of this Court, and that the Second Circuit's decision, requiring the legal theory to be pled, was also inconsistent with a previous decision of the Second Circuit itself. *See Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 600 (2d Cir. 1991) (holding the legal theory of third party beneficiary does not have to be

pled expressly in order to satisfy the requirements of the Federal Rules of Civil Procedure).

The Second Circuit denied the petition for rehearing. App. C.

REASON FOR GRANTING WRIT

I. The district court's and court of appeals' requirement that "legal theory" be pled expressly is inconsistent with Federal Rule of Civil Procedure 8(a), controlling decisions of this Court, and the decisions of other circuits.

The case *sub judice* presents the opportunity for this Court to resolve a question of pleading standards that has been left unresolved for some time. This Court recently decided two cases that clarified pleading standards; however, neither case resolved the question presented in this case, namely, whether a specific legal theory must be stated expressly in the pleadings.

In *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (2007), this Court held that a complaint alleging a violation of the Sherman Act required "more than labels and conclusions, and a formulaic recitation of [the] cause of action" in order to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Bell Atlantic Corp.*, 127 S.Ct. at 1965. Conversely, in *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197 (2007) (per curiam), this Court determined that a complaint was sufficient even though it stated

limited factual allegations.[2] The Court indicated that in order to be sufficient "the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 2200 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Ultimately, these cases leave a gap in the pleading requirements under the Federal Rules of Civil Procedure and neither answer nor address whether a complaint must state the party's specific legal theory.

Federal Rule of Civil Procedure 8(a)(2) merely requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The rule is silent as to whether the specific "legal theory" that underlies the claim must be pled. However, several courts of appeals have ruled there is no requirement of pleading expressly the underlying legal theory in a complaint. *See e.g., Flickinger,* 947 F.2d at 600 ("federal pleading is by statement of claim, not by legal theory"); *Newman v. Silver,* 713 F.2d 14, 16, n.1 (2d Cir. 1983) ("federal pleading . . . is by statement of claim, not by legal theories"); *Hefferman v. Bass*, 467 F.3d 596, 599 (7th Cir. 2006) (indicating that under the system of notice pleading "the plaintiff is not required to plead either facts of legal theories"). *See also Gins v. Mauser Plumbing Supply Co.,* 148 F.2d 974, 976 (2d Cir. 1945) ("particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not"); *Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, Charlotte*

[2] While the fact that Erickson was acting *pro se* factored in the Court's reasoning, there is no indication that this fact changes the essential analysis. Rather, the Court indicated that the "Court of Appeals' departure from the liberal pleading standards . . . is even *more pronounced* . . . because petitioner has been proceeding . . . without counsel." *Erickson,* 127 S.Ct. at 2200 (emphasis added).

Branch, 80 F.3d 895, 900 (4th Cir. 1996) (a claimant "need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it on any theory").

A decision by a court that holds legal theories must be pled in order to satisfy the Federal Rules of Civil Procedure ignores this Court's precedents and is inconsistent with a notice pleading system. For example, *Hickman v. Taylor*, 329 U.S. 495 (1947), holds that mental impressions, i.e., work product, of an attorney cannot be obtained in discovery absent extraordinary circumstances. The *Hickman* rule is embodied in the Federal Rules, which provides that "mental impressions, conclusions, opinions, legal theories of an attorney," are subject to discovery if the requesting party can demonstrate a substantial need and undue hardship. Fed. R. Civ. P. 26(b)(3). If counsel's legal theories cannot be obtained in discovery absent extraordinary circumstances, it is illogical to insist that they be expressly pled in the complaint. Not only is this interpretation logically inconsistent with the Federal Rules of Civil Procedure, such a requirement rewrites Fed. R. Civ. P. 8(a)(2), and excludes the limitation on discovery embodied in Fed. R. Civ. P. 26(b)(3). This Court should correct the inferior courts' decision to improperly broaden the Federal Rules of Civil Procedure. *See Bell Atlantic Corp.,* 127 S.Ct. at 1973, n.14. Furthermore, heightened pleading requirements are generally limited to circumstances that present "a high risk of abusive litigation." *Id.* (citing Fed. R. Civ. P. 9(b)-(c)).

This Court reversed the Second Circuit in a context analogous to the present case. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). In *Swierkiewicz*, the Second Circuit had held that the elements of a *prima facie* case of

race discrimination must be stated in the complaint. *Id.* at 510. This Court summarily reversed, rejecting the theory that "one misstep by counsel may be decisive to the outcome." *Swierkiewicz*, 534 U.S. at 514 (citing *Conley*, 355 U.S. at 48).[3] In *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993), the Court held there can be no "heightened pleading" in federal court, except in those particular situations described in Fed. R. Civ. P. 9(b). Such situations are not present in the case *sub judice*.

In this case, HealthExtras had notice of a breach of contract claim. When HealthExtras responded to the motion for summary judgment, it never alleged that it did not have notice of the breach of contract. In fact, in filing its answer and in filing its amended answer, HealthExtras explicitly denied committing a breach of contract. The district court raised the pleading defect on its own motion and implemented sua sponte a heightened pleading requirement. To be consistent with *Leatherman*, the Second Circuit should have held that the requirement against "heightened pleading" necessarily means that there is no mandate that legal theories expressly be pled.

Finally, by the district court's strict questioning of counsel about counsel's failure to plead the "elements" of a breach of contract, the district court apparently was relying upon New York state law's pleading requirements,

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[3] This point is bolstered in light of Fed. R. Civ. P. 54(c) that entitles a party to relief "even if the party has not demanded such relief in the party's pleadings." Furthermore, Campoli recognizes that *Swierkiewicz* does "not change the law of pleading." *Bell Atlantic Corp.*, 127 S.Ct. at 1973. Rather, the case is cited because this Court rejected the heightened pleading standard the Second Circuit implemented since it "was contrary to the Federal Rules' structure of liberal pleading requirements." *Id.*

which seem to embrace a requirement that elements of a legal theory be pled. *See First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998) (applying New York law and determining "an action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages"); *Ledain v. Town of Ontario*, 746 N.Y.S.2d 760, 763 (N.Y. Sup. 2002) ("The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage").

The Second Circuit's decision to rely upon New York law rather than the Federal Rules of Civil Procedure blatantly disregards *Hanna v. Plumer*, 380 U.S. 460, 465 (1965), which held the Federal Rules of Civil Procedure, not state law, govern federal pleadings.

CONCLUSION

This Court should grant the Writ to resolve the important question of whether "legal theories" need to be contained expressly in a federal complaint. Alternatively, this Court should summarily reverse the erroneous decision of the court below.

Respectfully submitted,

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APPENDIX A

06-0539
Campoli v. HealthExtras, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Apr. 06, 2007)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of April, two thousand seven.

PRESENT:

HON. ROBERT D. SACK,
HON. BARRINGTON D. PARKER,
HON. PETER W. HALL

Circuit Judges.

ROMANO CAMPOLI,

Plaintiff-Appellant,

- v -

HEALTHEXTRAS, INC.,

Defendant-Appellee, No. 06-0539

Chubb Group of Insurance Companies, Federal Insurance Co., and Sklover Group, Inc.,

Defendants.

Appearing for Appellant: JIM WAIDE, Tupelo, Mississippi

Appearing for Appellee: MARY A. GAMBARDELLA, Epstein, Becker & Green PC, Stamford, Connecticut

Appeal from a judgment of the United States District Court for the District of Connecticut (Mark R. Kravitz, *Judge*) granting summary judgment for the defendant-appellee.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

This lawsuit arises out of a denial of disability benefits under the plaintiff's $1 million disability insurance policy. Defendant-appellee HealthExtras, the lone remaining defendant markets various insurance policies through benefit programs, through which other insurance companies and financial institutions provide the actual insurance coverage. Pursuant to a scheduling order issued by the district court, the plaintiff filed a First Amended Complaint on January 5, 2005. The plaintiff conceded in his brief and at oral argument that the First Amended Complaint contained only two claims against HealthExtras: a misrepresentation claim and a claim that the defendant was vicariously liable as a joint venturer for a breach of contract. The district court granted summary judgment for the defendant on both of those claims. The plaintiff does not appeal those rulings.

Instead, even though the plaintiff concedes that he did not include a direct claim for breach of contract in the First Amended Complaint, he argues that this claim should be inferred as a legal theory from the complaint and the documents attached thereto. In addition, the

plaintiff challenges the district court's denial of leave to amend the complaint to include such a claim.

"We review *de novo* a district court's determination of whether a plaintiff's complaint complied with the notice pleading requirements of Fed. R. Civ. P. 8." *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006); *cf. Faulkner v. Beer*, 463 F.3d 130, 133 (2d Cir. 2006) ("We . . . review a dismissal for failure to plead with particularity as required by Rule 9(b) *de novo*."). "The standard for reviewing the denial of a motion to amend a complaint is 'abuse of discretion.'" *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 177 (2d Cir. 2006) (internal quotation marks and citation omitted). "Similarly, a scheduling order ruling under Federal Rule of Civil Procedure 16(b) is also reviewed for abuse of discretion." *Grochowski v. Phoenix Const.*, 318 F.3d 80, 86 (2d Cir. 2003) (citation omitted).

"A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Here, even under a generous reading, the First Amended Complaint did not confer "fair notice" to the defendant of a putative breach of contract claim. No such claim was expressly included in the complaint, and, as the district court correctly noted, the elements of such a claim were not implied thereby or by the documents attached to the complaint. The district court therefore properly determined that the First Amended Complaint failed to include

a "short and plain statement of the claim" that gave fair notice to the defendant of the substance of the breach of contract allegations.

The district court did not abuse its discretion in denying the plaintiff leave to amend the complaint in order to add a breach of contract claim. The district court first noted that the plaintiff had not demonstrated "good cause" to modify the scheduling order under Rule 16(b) of the Federal Rules of Civil Procedure. It then explained how such leave would prejudice the defendant in several significant ways. We find that, based on either rationale, the denial of the plaintiff's request was well within the sound discretion of the district judge.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
THOMAS ASREEN,
Acting Clerk of the Court

/s/ Lucille Carr
By:

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROMANO CAMPOLI,	:	
Plaintiff,	:	
v.	:	**No. 3:04CV1004 (MRK)**
CHUBB GROUP OF INSURANCE COMPANIES, et al.,	:	
Defendants.	:	

MEMORANDUM OF DECISION

(Filed Jan. 9, 2006)

In this action, Plaintiff Romano Campoli challenges the denial of his claim for disability benefits under a $1,000,000 disability insurance policy. Originally, the Defendants in this action included the Chubb Group of Insurance Companies ("Chubb"), Federal Insurance Company ("Federal"), The Sklover Group, Inc. ("Sklover") and HealthExtras, Inc. ("HEI"). However, early on, the Court granted a motion to compel arbitration of Plaintiff's claims against Federal and Chubb and stayed the action as to those Defendants. Furthermore, having been informed that Plaintiff has settled his claims against those Defendants, the Court recently dismissed the claims against Chubb and Federal. Amended Order [doc. # 141].[1]

[1] Federal is a member insurer of the Chubb Group of Insurance Companies, which, according to Federal, is merely the name given to the collection of insurance companies of which Federal is a member. In this Memorandum of Decision, Federal and Chubb are collectively referred to as "Federal."

The Court also granted the parties' request for a voluntary dismissal of all claims against Sklover. Order [doc. # 109].

Therefore, HEI is now the only remaining Defendant in this case. Mr. Campoli's First Amended Complaint [doc. # 93] asserts two claims against HEI. First, Mr. Campoli alleges that HEI made representations in letters and advertisements that it would pay him $1,000,000 if he became disabled but that these representations were false because Federal denied Mr. Campoli's disability claim and he did not receive $1,000,000 despite his claimed disability. First Amended Complaint ¶ XI (Misrepresentation). Second, Mr. Campoli claims that HEI is liable to him under the disability insurance policy because HEI was "involved in a joint venture for profit with Federal" and that HEI is "liable for the acts of Federal . . . who failed to honor the policy even though Plaintiff is disabled within the meaning of the policy." *Id.* ¶ XII (Liability Under Policy, Joint Venture). Mr. Campoli asserts that he has "suffered worry and anxiety as a result of . . . callous breaches of contract by Chubb and Federal, the joint venturers with HEI. . . ." *Id.* ¶ XIII.

Discovery having concluded, HEI has now moved for summary judgment. Motion for Summary Judgment by HealthExtras [doc. # 113]. In his response, Mr. Campoli conceded that he could not prove a misrepresentation claim against HEI and that judgment should enter for HEI on his misrepresentation claim. Plaintiff's Response in Opposition to Defendant HealthExtras, Inc.'s Motion for Summary Judgment [doc. # 120] ¶ I ("Plaintiff's Response") ("Plaintiff concedes summary judgment should be entered on the misrepresentation theory."). Accordingly, the Court entered summary judgment for HEI on Mr. Campoli's misrepresentation claim orally at argument on

HEI's motion. Order [doc. # 140]. The Court now GRANTS Defendant HEI's Motion for Summary Judgment [doc. # 113] on the remaining claim against it.

I.

The facts relevant to the pending motion are not in dispute. *See* Local Rule 56(a)(1) Statement of Undisputed Facts [doc. # 116]; Plaintiff's Opposition to Statement of Undisputed Facts and Statement of Facts Which are Disputed [doc. # 119]. HEI markets health and disability programs through financial institutions and other organizations, utilizing statement inserts, direct mail, telemarketing and the internet. HEI bundles together a group of benefits to be offered to financial institution account holders and then contracts with benefit providers, including insurance companies, brokers and financial institutions to provide these benefit programs to account holders. Some of the benefits offered by HEI are underwritten and others are not. Account holders wishing to obtain the benefits offered enroll as a member of HEI's benefit program and pay program membership fees to HEI.

The program that is the focus of this litigation had an effective date of November 1, 1999 (the "Benefit Program") and consisted of underwritten and non-underwritten benefits, including the $1,000,000 disability insurance policy at issue in this case (the "Disability Policy"), as well as a $2,500 emergency accident and sickness policy and a 24-hour nurse-on-call service. *See* Designation of Exhibits to Defendant HealthExtras, Inc.'s Memorandum of Law in Support of Motion for Summary Judgment [doc. # 118] ("HEI's Exhibits"), Ex. 4. In connection with the marketing of the Benefit Program, HEI entered into a contract with

Federal and Sklover (the "Marketing Agreement"). *See id.*, Ex. 1, 2. As a part of the Marketing Agreement, Federal agreed to underwrite the benefits provided by the Disability Policy, Sklover agreed to broker the policy and to provide certain administrative services, and HEI agreed to market the Benefit Program and also to provide certain administrative services. Among other provisions, the Marketing Agreement stated that "[n]either [HEI] nor Sklover shall have binding authority with respect to the Authorized Insurances, nor shall they have authority to handle any claims arising under the Policies that FEDERAL issues for the Program." *Id.*, Ex. 2, Art. 3.1. The Marketing Agreement, which the parties agree is to be construed and enforced in accordance with the law of the State of New Jersey, also provides as follows:

> The relationship between the parties shall, at all times, remain that of independent contractors. No party is responsible for the debts or liabilities of any other party. Except as expressly permitted herein, no party shall have any authority to bind or represent the other. Nothing herein shall be deemed to create any form of partnership or joint venture relationship or insurance agent relationship between any of the parties or their respective Affiliates.

Id., Ex. 2, Art. 13.1

Mr. Campoli received an advertisement for the Benefit Program in his credit card statement and enrolled in the Benefit Program, effective March 1, 2001. Mr. Campoli received a Program Summary, listing "the following benefits subject to terms and conditions described in the Program Plan Description and in the Master Policies where applicable noted below":

> $1,000,000 Catastrophic Injury and Disability Benefit, underwritten by Federal Insurance Company, a member of the Chubb Group of Insurance Companies, under the Voluntary Accident Insurance Plan Policy 6475 22 07
>
> $2500 Emergency Accident and Sickness Medical Benefit, underwritten by Virginia Surety Company, Inc. under the Travel Protection Policy HTP00137
>
> 24-Hour Nurse-on-Call is a service provided by HealthExtras.

Id., Ex. 4. Mr. Campoli also received the Plan Description for the Disability Policy, including the Certificate of Insurance Declarations and the Certificate of Insurance Contract. The Plan Description states that the company offering the disability benefits is Federal and that Federal "will pay the applicable Benefit Amount if an Accident results in a Loss not otherwise excluded." *Id.,* Ex. 5 at 4, 7.

Approximately eight months after enrolling in the HEI Benefit Program, Mr. Campoli was injured. He asserts that he became faint, fell and struck his head and, as a result, has been left with significant neurological disability, including virtually no use of his left upper extremity and only minimal movement in his left leg, memory loss and other cognitive deficits, slurred speech, depression and difficulty swallowing. He needs assistance with bathing, meal preparation and numerous other activities of daily living. Mrs. Campoli called the HEI customer service telephone number, obtained a claim form from HEI and timely submitted to Federal a claim on their Disability Policy. However, Federal denied coverage in January 2003, asserting that Mr. Campoli's fall was not the result of an "Accident," as defined in the policy, but

rather as the result of a intracerebral hemorrhage in the basal ganglia. *Id.*, Ex. 6. This litigation followed.[2]

Mr. Campoli was arbitrating his coverage dispute with Federal in accordance with the insurance policy when the parties arrived at a settlement of Mr. Campoli's insurance claim. *See* Ruling and Order Granting Motion to Compel Arbitration [doc. # 81]; Rule 41(b) Notice [doc. # 133]. According to Mr. Campoli, his settlement with Federal expressly contemplates and permits his pursuit of this action against HEI. *See* Plaintiff's Response to HealthExtras, Inc.'s Supplemental Reply to Plaintiff's Response to Its Motion for Summary Judgment [doc. # 138] at 5.

II.

The only count remaining in the First Amended Complaint is a claim asserting that HEI is vicariously liable for Federal's breach of the Disability Policy because HEI "was involved in a joint venture for profit with Federal." First Amended Complaint ¶ XII. HEI is entitled to summary judgment on this claim because no juror could reasonably conclude on the basis of the undisputed facts that HEI and Federal were joint venturers.

As Mr. Campoli's counsel all but conceded at oral argument, there are a number of fundamental problems with Mr. Campoli's joint venture claim. To begin with, in his response to HEI's statement of undisputed facts, Mr. Campoli admitted that the "business arrangement

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[2] This case was originally filed in the United States District Court for the Northern District of Mississippi but was transferred to this Court in June 2004. *See* [doc. # 34].

[between Federal, HEI and Sklover] *involved HEI, Sklover and Federal as independent contractors and not as parties to any joint venture relationship.*" Opposition to Statement of Undisputed Facts [doc. # 119] ¶ 14. As Mr. Campoli's counsel acknowledged at argument, this statement constitutes a judicial admission that HEI and Federal were *not* joint venturers and thus dooms Mr. Campoli's claim. *See, e.g., Pacheco v. Serendensky,* 393 F.3d 348, 354 (2d. Cir. 2004) ("A party's assertion of fact in a pleading is a judicial admission by which [the party] normally is bound throughout the course of the proceeding.") (internal quotation marks omitted). Nevertheless, Mr. Campoli's counsel asserted at oral argument that the Court should ignore this admission because it was "inadvertent" on counsel's part and HEI would not be prejudiced by allowing Mr. Campoli to withdraw the admission at this time. As HEI rightly noted at argument, at no time prior to the actual day of oral argument had Mr. Campoli's counsel ever sought to withdraw the admission, even though counsel surely was aware of the admission, since it was featured as the first argument in HEI's reply brief, which was filed on October 4, 2005, two and one-half months *before* oral argument on December 20, 2005. *See* Defendant HealthExtras, Inc.'s Reply to Plaintiff's Opposition to its Motion for Summary Judgment [doc. # 124], at 2 ("This Court should enter judgment in HEI's favor, as Campoli ***admits*** in his counterstatement of undisputed facts that HEI, [Federal and Sklover] were not parties 'to any joint venture relationship'") (emphasis in original). Mr. Campoli's counsel did not assert any good cause for failing to take steps to withdraw the admission before argument. Nevertheless, to avoid visiting the sins of counsel on his innocent client, and in recognition of the fact that HEI is not seriously prejudiced by allowing withdrawal of the

admission at this late date, the Court will exercise its discretion to allow Mr. Campoli to withdraw his admission.

In any event, counsel's admission was perhaps no more than a Freudian slip, since the undisputed facts show conclusively what the admission concedes – that the business arrangement among Federal, Sklover and HEI was one of independent contractors and not joint venturers. While the existence of a joint venture may raise disputed issues of fact, that is not the case here.

There is no dispute that New Jersey law governs this issue.[3] As the Second Circuit has explained:

> [u]nder New Jersey law . . . the elements of a joint venture are essentially the same as of a partnership. These elements include agreement, sharing profits and losses, ownership and control of the partnership's property and business, community of power, rights upon dissolution and the conduct of the parties towards third persons, among others. Joint venture status is created by contract, express or implied.

Geneva Pharmaceuticals Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 512 (2d Cir. 2004) (internal citations omitted). Similarly, the Third Circuit in *USX Corp. v. Chubb Group of Insurance Companies,* 68 F.3d 811 (3d Cir. 1995) held that in addition to an agreement, the "[o]ther requisite elements of a joint venture [under New Jersey law] are:

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[3] In his opposition brief, Mr. Campoli states, "Plaintiff accepts as correct Defendant's contention that New Jersey law applies to the joint venture issue." Brief in Opposition to Defendant HealthExtras, Inc.'s Motion for Summary Judgment [doc. # 121], at 21 n.4.

> (1) The contribution by each party of money, property, effort, knowledge or some other asset to a common undertaking;
>
> (2) The existence of a joint property interest in the subject matter of the venture;
>
> (3) The right of mutual control or management of the venture; *and*
>
> (4) An agreement to share the profits or losses of the venture.

Id. at 826 (emphasis added). Mr. Campoli is not able to show that any of these requisites are met in this case.

First, courts have repeatedly held that the "*sine qua non* of a joint venture is a contract, express or implied; that is, an actual *agreement* between the parties." *Id.*; *see Wittner v. Metzger*, 72 N.J. Super. 438, 445, 178 A.2d 671, 675-76 (1962) ("Whether the parties have created the relationship of a joint venture depends upon their intention in accordance with the ordinary rules governing the interpretation and construction of contracts. . . . It is the revealed intention that is to be effectuated, the sense that would be given the interpretation by a reasonably intelligent person."). Here, however, the parties' contract expressly states that they agreed not to become joint venturers but rather to remain independent contractors only. *See* HEI's Exhibits, Exhibit 2, Art. 13.1. As the District of New Jersey held in a similar case, "[t]his Court will not create a joint venture between the parties which they did not intend to create for themselves." *Gunter v. Ridgewood Energy Corp.*, 32 F. Supp. 2d 166, 180 (D.N.J. 1998).

Second, as Mr. Campoli's counsel again acknowledged at argument, there is no evidence of mutual control or

management of a venture. There is thus no evidence that HEI had any control over Federal's management of or decisions regarding the Disability Program, or, for that matter, that Federal had any control over HEI's Benefit Program. *See* HEI's Exhibits, Deposition of James Hamilton, at 12-14, 49, 52-53; Deposition of Joanna Ficklin, at 24-27, 72, 80. To the contrary, the evidence shows that each company had responsibility for managing its own functions and duties under the Marketing Agreement. Thus, HEI had no input into or responsibility over the handling of Mr. Campoli's disability claim or the underwriting of Mr. Campoli's disability insurance policy, as the Marketing Agreement itself confirms. HEI's Exhibits, Ex. 2, Art. 3.1 ("Neither [HEI] nor Sklover shall have binding authority with respect to the Authorized Insurances, nor shall they have authority to handle any claims arising under the Policies that FEDERAL issues for the Program."). All of that was under the sole control of Federal.

Third, there is no evidence that the parties intended to, or did, share profits or losses. Thus, as Mr. Campoli's counsel conceded at argument, there is no evidence that if Federal lost money in underwriting the Disability Policy, HEI would share in those losses or that if Federal made money on the policies, HEI would share in those profits. Similarly, there is no evidence that Federal would share in the profits or losses HEI earned on the Benefit Program. Instead, all of the evidence shows that, like the independent contractors they were, Federal and HEI retained their own losses and their own profits. *Id.*, Deposition of Joanna Ficklin, at 72.

The only evidence that Mr. Campoli points to in this regard is that under the terms of the parties' agreement, an "initial deposit" of $100,000 was to be paid to Federal

and "[f]uture amounts due [Federal] may be applied against this deposit." *Id.*, Ex. 1. Also, Mr. Campoli contends that the parties shared premium fees for the insurance Federal provided. However, Mr. Campoli is simply wrong that the parties shared insurance premiums. The undisputed testimony was that HEI collected all program fees paid by Benefit Program members; HEI then remitted a portion of those program revenues to Sklover, the insurance broker, who would retain a portion for broker of record services, and then use the balance to pay the insurance premium to Federal for providing HEI disability insurance for its members. *Id.*, Deposition of Joanna Ficklin, at 86-87; Deposition of James Hamilton, at 52; Deposition of Andrew Sklover at 52. Federal established the premium for the insurance it provided. *Id.*, Deposition of Joanna Ficklin, at 71. The $100,000 deposit was an advance on expected program revenues. Thus, the evidence shows that HEI collected all program revenues and then paid a portion of those gross program revenues to the other service providers, Sklover and Federal, as payment for their provision of services. But the sharing of gross revenues in this fashion is a far cry from the sharing of profits or losses, and it is the latter that is the indicia of a joint venture.

Fourth and finally, there was a common undertaking in that HEI organized a number of service providers so that HEI could offer that bundle of services to the account holders of financial institutions. However, Federal was interested in the marketing of its insurance; there is no evidence that Federal was interested in all of the services HEI was offering. Therefore, to say that this arrangement was a common undertaking is to say that a building is a common undertaking of the general contractor, plumber,

electrician, roofer, painter and carpenter. Each, of course, has an overall interest in the smooth and efficient completion of the structure, but typically, they do not share profits or losses and each is responsible for its own employees and work. That is precisely what the evidence shows in this case, and that is not indicative of a joint venture. Accordingly, HEI is entitled to summary judgment on Mr. Campoli's claims that as a joint venturer with Federal, HEI is vicariously liable for the alleged breaches of contract committed by Federal.

III.

In an apparent effort to head off a grant of summary judgment, counsel for Mr. Campoli sought at oral argument to advance several new theories of liability, including a claim that HEI committed a direct breach of a contract it had entered into with Mr. Campoli and also that HEI had contractually guaranteed Federal's obligations under its insurance contract with Mr. Campoli. As the colloquy at argument revealed, these new theories suffer from a number of evidentiary and conceptual difficulties. However, the most significant – and ultimately fatal – problem with these new theories of liability is that they have never been pleaded. Accordingly, the Court will not entertain them at this late date.

In his original complaint in this case, Mr. Campoli asserted only a misrepresentation claim against HEI. After granting the motion to compel arbitration and staying claims against Federal, the Court entered a Scheduling Order [doc. # 87], in which the Court required the parties to join any additional parties and file any and all amendments of pleadings no later than January 5,

2005. In accordance with the Scheduling Order, Mr. Campoli moved to amend the complaint on January 5, 2005 to assert a joint venture/vicarious liability claim against HEI. It is apparent from the proposed amended complaint that the claim asserted against HEI was for breaches of contract *by Federal*; nothing in the amended complaint asserts direct breaches by HEI. *See* First Amended Complaint [doc. # 93]. HEI did not object to the filing of the Amended Complaint and the Court granted the motion to amend. Thereafter, the parties conducted discovery on the claims pleaded and once discovery closed, HEI filed a motion for summary judgment.

At no point prior to oral argument on HEI's motion did Mr. Campoli ever seek leave to amend his complaint to add additional claims, and perhaps for good reason. For, as Mr. Campoli's counsel acknowledged at oral argument, he was fully aware of all facts supporting his new theories of liability even at the time he filed his First Amended Complaint, the only reason he did not assert the claims now at issue was that "his brain did not think of it," and to this day he has not sought to amend the complaint because he doubted that he could make the showing of good cause necessary to support an amendment at this late date, after all discovery has closed. Mr. Campoli's counsel is certainly correct that in these circumstances, he could not, as he must, show good cause under Rule 16. *See, e.g., Grochowski v. Phoenix Const.*, 318 F.3d 80, 86 (2d Cir. 2003) ("Where a scheduling order has been entered, the lenient standard under Rule 15(a), which provides leave to amend 'shall be freely given,' must be balanced against the requirement under Rule 16(b) that the Court's scheduling order 'shall not be modified except upon a showing of good cause.'") (internal citations omitted).

However, Mr. Campoli's counsel contends that a generous reading of his Complaint is appropriate and that, under such a reading, he did plead a direct breach of contract claim against HEI. The First Amended Complaint does no such thing. To the extent that representations by HEI are cited, they are cited in support of a misrepresentation claim only. And when that pleading turns to a breach of contract claim, the only breaches cited are breaches by Federal, for which Mr. Campoli seeks to hold HEI vicariously liable. There is no allegation that HEI and Mr. Campoli entered into any contract, what the terms of the contract were, what terms HEI (as opposed to Federal) breached, and how Mr. Campoli was damaged by HEI's (as opposed to Federal's) breaches. Yet, these allegations are essential to pleading a breach of contract claim. Mr. Campoli's counsel asserts that he appended to his Complaint the documents that made up his client's contract with HEI, but those documents are referenced in the complaint as constituting false representations by HEI, not contractual undertakings.

Finally, the Court believes that HEI would be unfairly prejudiced by injecting these new theories of liability into this case at this late date. For one, HEI has not conducted discovery on those claims since they were not in the Complaint. Secondly, HEI has incurred presumably substantial costs moving for summary judgment on a complaint that Mr. Campoli's counsel would apparently like to make a moving target. Third and finally, at argument, Mr. Campoli's counsel said that the contract between HEI and his client included all of the terms of the Federal insurance policy. But if that were true, then HEI would be entitled to arbitrate those contractual claims, just as the Court found that Federal was entitled to do.

HEI did not seek to arbitrate Mr. Campoli's claims because there was no contract claim against HEI in his complaint and the Federal-Campoli arbitration is now completed in view of their settlement. Thus, by delaying the assertion of his alleged contract claims against HEI, Mr. Campoli has deprived HEI of the option of participating in the Federal-Campoli arbitration.[4]

Thus, the record shows that Mr. Campoli's newly asserted theories of liability are not found anywhere in his First Amended Complaint, which he has never sought to amend, he lacks good cause for not moving sooner to amend the Complaint, he has unnecessarily delayed in seeking to raise these new theories of liability until after the close of discovery and the filing of summary judgment briefs, and HEI would be unfairly prejudiced if the Court were now to consider those new theories of liability. In those circumstances, the Court will not entertain the new theories of liability that Mr. Campoli's counsel has asserted in an effort to avoid the grant of summary judgment. *See, e.g., Grochowski,* 318 F.3d at 86 (Observing that a "finding of good cause depends on the diligence of the moving party," and upholding the district court's refusal to find such good cause where, "when the motion [to amend] was filed, discovery had been completed and a summary judgment motion was pending."); *Trilegiant Corp., v. BP Products North America, Inc.,* No. 3:02CV2237 (MRK), 2004 WL 813023 (D. Conn. Apr. 6, 2004) at *1 ("[I]f the

[4] When the Court granted Federal's motion to compel arbitration, it invited the other parties voluntarily to join that arbitration. HEI declined, but at that time the only claim against it was for a tort, misrepresentation. HEI was never given the option of arbitrating a contract claim.

Court finds that the movant has engaged in undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or if amendment would cause undue prejudice to the opposing party the Court has discretion to deny leave to amend.") (internal quotation marks omitted).

IV.

The Court GRANTS Defendant HealthExtras, Inc.'s Motion for Summary Judgment [doc. # 113]. **The Court directs the Clerk to enter summary judgment for HealthExtras on all of Plaintiff's claims and to close this file.**

IT IS SO ORDERED,

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: **January 9, 2006.**

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	06-0539-cv
Short Title:	Campoli v. Chubb Group of Ins Companies
DC Docket Number:	04-cv-1004
DC:	CONNECTICUT (NEW HAVEN)
DC Judge:	Honorable Mark Kravitz

(Filed Apr. 25, 2006)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of April two thousand 2007.

Present:

Hon. Robert D. Sack,

Hon. Barrington D. Parker,

Hon. Peter W. Hall,

CIRCUIT JUDGES.

Campoli v. Healthextras, Inc.

A petition for panel rehearing having been filed herein by Appellant Romano Campoli,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED**.

For the Court,
Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney